

No. 15673 ✓

United States
Court of Appeals
for the Ninth Circuit

ROBERT LEE KORTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

FILED

DEC - 9 1957

PAUL P. GRIFFIN, CLERK

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of.....	1
Certificate of Clerk to Record on Appeal.....	74
Indictment	3
Judgment and Commitment.....	6
Notice of Appeal.....	7
Statement of Points to Be Raised on Appeal..	76
Stipulation Re Selective Service File.....	78
Waiver of Jury Trial.....	5
Transcript of Proceedings.....	8
Opening Statement on Behalf of the Plaintiff..	9

Witnesses:

Korte, Robert Lee, Jr.

—direct	41
—cross	49
—redirect	53

Korte, Mrs. Robert Lee, Jr.

—by the court.....	63
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NAMES AND ADDRESSES OF ATTORNEYS

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U. S. Post Office Building,
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For Appellee.

In the United States District Court, for the Northern District of California, Southern Division

Criminal No. 35569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT LEE KORTE,

Defendant.

INDICTMENT

Violation: Section 12(a), Universal Military Training and Service Act (50 U.S.C., App. 462(a))

The Grand Jury charges that: Robert Lee Korte, defendant herein, being a male citizen, of the age of 24 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948," as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 40 of the Selective Service System in the City of San Francisco, County of San Francisco, State of California, which said Local Board No. 40 was duly created, appointed and acting for the area

of which the said defendant is a registrant, did, on or about the 26th day of November, 1956, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 40, to report to his said Local Board No. 40 to be given instructions to proceed to a place of employment designated by said Local Board No. 40 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest as provided in the said Act and the rules and regulations made pursuant thereto.

A True Bill.

/s/ W. I. KOHNKE,
Foreman.

/s/ LLOYD H. BURKE,
United States Attorney.

Approved as to form:

/s/ J. H. RIORDAN, JR.

Bail, \$500.00.

/s/ O. D. HAMLIN.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above-entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, May 29, 1957.

/s/ ROBERT LEE KORTE,
Defendant.

/s/ RICHARD J. WERTHEIMER,
Attorney for Defendant.

/s/ DONALD B. CONSTINE,
Assistant United States
Attorney.

Approved:

/s/ EDWARD P. MURPHY,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed May 29, 1957.

United States District Court, for the Northern
District of California, Southern Division

No. 35569

UNITED STATES OF AMERICA,

vs.

ROBERT LEE KORTE.

JUDGMENT AND COMMITMENT

On this 17th day of June, 1957, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a Finding of Guilty after trial by Court, Jury having been waived in writing of the offense of Violation of Title 50 U.S.C., § 12(a) App. 462(a), Universal Military Training and Service Act, in that on November 26, 1956, deft. knowingly failed to perform work contributing to the maintenance of the national health, safety & interest as charged in the One (1) Count Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of Nine (9) Months.

It Is Adjudged that Defendant be granted bail on appeal, bail set in the amount of \$500.00.

Examined by:

/s/ DONALD B. CONSTINE,
Asst. U. S. Atty.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Entered June 20, 1957.

[Endorsed]: Filed June 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Honorable Michael J. Roche, Judge of the
United States District Court of Appeals and
To Donald Constine, Attorney for plaintiff.

Take Notice that the defendant in the above-entitled action hereby appeals to the United States Court of Appeals, Ninth Circuit, from the judgment herein made and entered in the said United

States District Court on the 17th day of June, 1957,
in favor of said plaintiff and against said defendant
and from the whole of said judgment.

Dated: June 17, 1957.

/s/ RICHARD J. WERTHEIMER,
Attorney for Plaintiff.

[Endorsed]: Filed June 21, 1957.

In the District Court of the United States, for the
Northern District of California, Southern Di-
vision

No. 35,569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT LEE KORTE,

Defendant.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

LLOYD H. BURKE,

United States Attorney, By

DONALD B. CONSTINE, ESQ.,

Assistant United States Attorney.

For the Defendant:

RICHARD J. WERTHEIMER, ESQ.

Monday, June 3, 1957—10:00 o'Clock A.M.

OPENING STATEMENT ON BEHALF
OF THE PLAINTIFF

Mr. Constine: If it please the Court, the file in this case indicates that an indictment was returned against this defendant on March 27, 1957. The defendant plead not guilty and waived a jury trial. So we have before your Honor for Court trial this morning this case.

The indictment charges, your Honor, that this defendant is 24 years of age and is a registrant of Local Board 40. That is in San Francisco.

The indictment charges that he was classified 1-O, which is a conscientious objector classification.

The indictment charges that he refused to report to his local board to be given instructions to proceed to a place of employment to perform work which would contribute to the national health, safety and interest, in lieu of induction. In other words, your Honor, this indictment charges that this defendant was classified as a conscientious objector and refused to perform civilian work in lieu of induction.

The government will show, your Honor, that this defendant, back in 1952 and 1953, was classified 1-A and was ordered to report for induction. We will prove that this defendant refused to report for induction and was indicted for that refusal to report for induction as a 1-A classified [3*] registrant. We will show that he was convicted in this

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

the document I have numbered as No. 2 with a slip of paper in the file. That is the special form for conscientious objection received by the local board on April 21, 1952.

On the first page of that document, in the middle of the page, where it says "Claim for Exemption," the defendant indicates he is opposed to both combatant and non-combatant service in the armed forces.

I wish to call your Honor's attention to page 3 of that same questionnaire. The defendant indicates in Item 1 that he was a member of the Reserve Officers Training Corps, University of California, and he states, however, he was a member because it was compulsory to be so. He also states that he is a member of Jehovah's Witnesses, and on the bottom of that page he states he has been a member of the Lutheran Church in San Francisco.

I wish to call your Honor's attention to a document that I have marked as No. 3 with a slip of paper.

The Court: May 5, 1952?

Mr. Constine: Yes. I wish to read this into the record. [6] The personal interview sheet of the hearing of this defendant indicates that registrant submitted Form 150, Conscientious Objector (reading):

"Registrant reported he has been ordained as a minister since last Sunday 5-4-52. Has belonged to Jehovah's Witnesses since about a year ago. Before that he belonged to the Lutheran Church. Is now employed full time as clerk at the Western

Pacific Railroad. Preaches on Sundays only. Is not now living with parents; has vacant room at girl friend's house, 1821-25th Street. Registrant advised to appeal."

This document is dated May 5, 1952, and it is the interview sheet.

I might state subsequent to this interview he was retained in Class 1-A on May 5, 1952.

Document No. 4, which I have marked as No. 4 in your Honor's file, is merely the certificate of acceptability dated January 19, 1953, indicating he is fully acceptable for service in the armed forces as being physically fit. That is called the certificate of acceptability. I have marked that as No. 4. That document indicates he is physically fit for service in the armed forces.

Document No. 5, your Honor, dated March 3, 1953, is the Department of Justice letter to the Appeal Board in San [7] Francisco, and I wish to read from the bottom of page 2 of that letter—not the first page, but the bottom of page 2 of that letter, which is the conclusion (reading):

"The Hearing Officer concluded that registrant was a bona fide conscientious objector in spite of his comparatively recent conversion. He recommended a 1-I-O classification."

I read on on page 3 (reading):

"Although there is no reason to question registrant's sincere adherence to the precepts of his church, he has failed to establish his claim as a true conscientious objector. By the statement in his SSS

Form 150, wherein registrant admits that he will engage in war if commanded by God, he has removed himself from the purview of the Universal Military Training and Service Act, which requires that a registrant must be opposed to participation in war in any form in order to merit exemption. Registrant's willingness to indulge in theocratic warfare if so ordered by Jehovah necessitates a denial of his claim."

Then the letter concludes (reading):

"After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and [8] non-combatant service are not sustained."

Document No. 6, if your Honor please, is merely the record of appeal, which indicates that he appealed on May 19, 1952. On March 19, 1953, he was classified by his appeal board 1-A, and he was so notified by his local board on March 23, 1953.

Document No. 7, your Honor, is the order to report for induction dated April 13, 1953, in which he is ordered to report on April 28, 1953, at the armed forces induction station in San Francisco.

Document No. 8, if your Honor please, is a letter to the local board from the United States Attorney's office dated June 1, 1953, which indicates that the defendant was indicted on May 13, 1953, for refusal to submit to induction.

Document No. 9, if your Honor please, dated July 3, 1953, is a letter to the local board, again, from the United States Attorney's office, indicating

that the defendant was convicted on July 2, 1953, for refusal to submit to induction.

Document No. 10, if your Honor please——

The Court: Dated July 14, 1953?

Mr. Constine: Yes. That is, again, a letter from the office of the United States Attorney to the local board, indicating that United States District Judge Monroe F. Friedman—that is, the former United States District Judge Monroe Friedman, sentenced the defendant to a term of 18 months in prison, and that was on July 13, 1953. [9]

I might state that thereafter this defendant, your Honor, on September 10, 1953, was classified 4-F, inasmuch as he was in prison in the United States Penitentiary.

The Court: Where does that appear?

Mr. Constine: Your Honor, it does not appear in the file at that point, but by reference back you would find after this letter the defendant was placed in Class 4-F.

Document No. 11, dated December 6, 1954, is a letter to the local board from the office of the U. S. Attorney dated December 6, 1954, advising them that the registrant was released from the United States Penitentiary on March 24, 1954, and was presently on parole. The letter states the parole of this defendant would not expire until February 2, 1955.

I might state, your Honor, that after this letter the registrant was on parole and was then classified in February of 1955. It does not appear chronologically, but I will state, and I am sure counsel will

agree, in February, 1955, he was classified 1-A, and this, I might say, your Honor, is the commencement of the second proceeding for this defendant.

Document No. 12 is really the commencement of the defendant's file which is the basis of this prosecution.

The Court: Dated February 11, 1955.

Mr. Constine: That is correct, your Honor. That is when it was received by the local board. It is dated February 9th and was received February 11th. It is the defendant's letter [10] to the local board. It states as follows (reading):

"Gentlemen:

"This letter is in reply to your card of February 4, 1955. It seems I have once again been classified 1-A by your board."

And then he goes on to say (reading):

"I believe my sincerity as a conscientious objector was thoroughly demonstrated by my previous course of action; and the records of the Watchtower Bible and Tract Society of Brooklyn contain my activities in this duly recognized religious organization."

He states as follows (reading):

"Since, therefore, I am a conscientious objector and a duly ordained minister of religion, I hereby request the withdrawal of Classification 1-A to be substituted by my proper classification, namely, 4-D."——

which is the ministerial classification.

I might state, in effect, your Honor, this is his letter of appeal from his classification of 1-A.

Document numbered 13 in your Honor's file——
The Court: 11 February, 1955.

Mr. Constine: Yes, sir—is the Special Conscientious Objector Form received by the local board on February 18, 1955. [11] It was sent on February 11, 1955. And I only call this to your Honor's attention at the bottom of page 2 of that same document there is listed this defendant's employments from 1952 to 1955, indicating that the defendant has held a number of jobs: Office clerk, mechanic, salesman, mechanic-salesman, salesman, mechanic. And it lists a number of his employers: Southern Pacific, Western Pacific, Cardinal Chemical Company, City of Paris, ABC Weatherstrip Company, Kirby Company of Central California, Davies Automobile Company, which apparently was his employer at the time this document was prepared.

Your Honor, Document No. 14 is the next document I wish to call to your Honor's attention, and that is a letter to the local board from the registrant dated March 7, 1955. I wish to read the first paragraph of that letter, which states as follows (reading):

“I certainly do regret that this reply is tardy, and sincerely hope it will not put you to any extra trouble. I have been so busy compiling all my data that the time passed by before I realized it. This letter is in reply to your form concerning my ecclesiastical duties. Enclosed also please find (1) notarized affidavit from Watchtower Bible and

Tract Society, Inc.; (2) public lecture handbills; (3) letters from other ministers, and (4) copies of my ministerial [12] activities.”

The letter goes on to state what he does as a minister. However, I wish to call to your Honor’s attention page 9 of this letter, this same letter, which is numbered page 9. It is a rather long letter, but I ask you to turn to page 9, your Honor.

The Court: Proceed.

Mr. Constine: An item which he has numbered IV, he states as follows (reading):

“Since we do not receive a salary, or are otherwise reimbursed for our ministerial duties, it is necessary (and scriptural) to work secularly to earn a living. Being married, I have an obligation before God to provide for my household, and this is done through secular work. It is important to note, however, the main reason for secular work is to support my ministerial activities. I am now employed at Davies Auto Company in Redwood City, working out in the garage. I previously had a selling job, but gave it up as it took up too much of my time. I do not desire to make a lot of money, but to work the minimum number of hours, that is, 40 hours a week. From this particular job I would earn in a year about \$3,400 gross. My plans for the future are, of course, to enter the pioneer or [13] full-time minister with my wife.”

Your Honor, he says he plans in the future to enter the pioneer or full-time ministry with his wife.

He concludes by saying he has some additional

documents to be forwarded to the board at a later date.

Document 15, your Honor, was enclosed in this letter that he sent. It is numbered 15 by the slip of paper, and it is a document dated February 16, 1955, issued by the Watchtower Bible and Tract Society, indicating that this registrant was an assistant presiding minister of the Menlo Park, California, congregation of Jehovah's Witnesses since December 7, 1954.

Document 16, your Honor, is an interview sheet, or information sheet dated on the last page April 13, 1955. It is numbered in your Honor's file No. 16. It has the registrant's name on the top with his selective service number, and I wish to read into the record portions of this sheet (reading):

“When did you first become a member thereof? Date baptized 4-17-52.

“Have you maintained your membership continuously therein since you first became a member? Yes. Have been active in society work since that date. A membership roll is not kept by this society.”

Item B (reading):

“What course of study were you required to [14] complete before you were qualified to become a minister? Course of study outlined by society. No set time to prescribe the course. Depends upon individual. Scripturally minister is not required to attend theological seminary or divinity school. Christ himself did not. Individual knows when he is ready to serve the Lord and no one has to tell him.”

And then he goes on to state he is still studying in that course. (Reading:)

“If a regular minister, are you recognized as such by the Church?”

The answer is “Yes.” (Reading:)

“Are you legally qualified to perform marriage ceremonies?”

And the answer is “Yes.” (Reading:)

“If you are, how many marriages did you solemnize in the last calendar year?”

The answer is “None.” (Reading:)

“Are you authorized by your church or religious organization to conduct funeral services?”

He answers “Yes.” (Reading:)

“If you are, how many such funeral services did you conduct in the last calendar year?”

He answers “None.” And so on. [15]

He states on page 2 of that same document, your Honor, that he holds services on Saturdays and Sundays, and on Monday, Tuesday, Wednesday and Friday evenings. He states he spends about 25 hours a week during the past 12 months in his ministerial duties. He says he receives no pay.

He also states that he is employed by the Cardinal Chemical Company, and that he worked 20 hours in last week (reading):

“Have you been employed during the present calendar year?”

He states he has, and he names the Davies Auto Company as his employer, and that he worked 40 hours per week.

I might state, your Honor, that after this information sheet was given to the defendant he was placed in Class 1-A by his board on April 13, 1955, so Document 17 in your Honor's file is the letter of the defendant dated April 18, 1955, in which he states (reading):

“At this time your classification of 1-A was continued despite the facts in my file attesting to my sincerity as a conscientious objector and my activities as a regular and duly ordained minister of religion.”

That is Document No. 17 in your Honor's file.

Document No. 17-A, as I have marked in your Honor's file, is merely a certificate of acceptability indicating that this defendant was re-examined, and that he was still found, on [16] December 14, 1955, as fully acceptable for induction into the armed forces.

Document No. 18, your Honor, I wish to spend some time with, inasmuch as this is perhaps the most important document in the file. It is a letter dated February 29, 1956. This is the letter of the Department of Justice, the ultimate one, to the Appeal Board. This is the second hearing of the registrant before the Appeal Board. Inasmuch as counsel's file may not be in the same order mine is, may I assist him in locating the document, your Honor? I call this document No. 18.

This is, your Honor, the results of the hearing on the second occasion for the new classification subsequent to his imprisonment. It states, in the first paragraph—I will read all of page 1 (reading):

“As required by Section 6 (j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. Frank O. Merritt, a Hearing Officer for the Department of Justice.

“The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the resume of [17] the inquiry attached hereto and made a part hereof.

“The registrant will be 23 years of age on March 22, 1956; he is married, a high school graduate, and attended college for about one and one-half years. At the time of his hearing he was engaged in the servicing of swimming pools, and has previously worked as a general laborer, and with automobiles. He is a Jehovah's Witness, and has claimed exemption from both combatant and non-combatant military training and service.

“Registrant's Selective Service File reflects that his father is a protestant, his mother a Presbyterian, and that he, the registrant, was formerly a member of the Lutheran Church. He participated in R.O.T.C. training while in attendance at college, but

he indicated that this was prior to his becoming a conscientious objector.”

Then it goes on, your Honor, to state the history. Well, I will read all of page 2 at this point (reading):

“He indicated that he left college and the R.O.T.C. organization because of his newly-adopted views. It is also indicated that he came in contact with Jehovah’s Witnesses in about 1950 or 1951, through his former fiancée, and that he was baptized in the spring of 1952. He indicated that he has [18] dedicated his life to serving Jehovah God and His Son Christ Jesus.”

The second paragraph reads as follows (reading):

“The resume of the inquiry reflects that registrant was found guilty of a violation of the Selective Service Act in July of 1953; that he was sentenced to 18 months imprisonment; that he was released from prison in March of 1954, and released from parole in February of 1955.”

The third paragraph reads as follows (reading):

“The registrant personally appeared before the Hearing Officer on August 23, 1955, at San Francisco, California. He submitted to the Hearing Officer”—certain documents, this letter states, and (reading):

“The Hearing Officer reported that registrant admitted receiving a copy of the resume of the inquiry, and that his objections thereto are outlined

in the letter addressed to the Hearing Officer"—et cetera.

I might state this, your Honor: Unlike cases we have had in the past, the registrant now receives a copy of the FBI report prior to his hearing, so that any adverse material in it he may bring to the attention of the Hearing Officer and contest. This letter merely states he acknowledges receiving a copy of this document. [19]

The Court: I have an appointment. We will have to take a recess until two o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m.) [19-A]

Monday, June 3, 1957—2:00 o'Clock P.M.

Opening Statement on Behalf of the Plaintiff
(Resumed)

Mr. Constine: Your Honor, at the close of the session this morning we were presenting the case of United States against Korte, and advised your Honor that this defendant had first been classified 1-A, had been ordered to report for induction, and had refused, and had been indicted and sentenced to a term of 18 months.

We were then in the course of presenting the second phase of the case.

The second time around is on Document No. 18 in your Honor's file, which was the report of the second hearing he had had before the Department of Justice.

The Court: Very well.

Mr. Constine: I was reading, your Honor.

The Court: This is February 29, 1956?

Mr. Constine: Yes, sir.

And I was reading from page 2 of that document which I wish to complete this record (reading):

“The registrant personally appeared before the Hearing Officer on August 23, 1955, at San Francisco, California. He submitted to the Hearing Officer three letters which are attached. The Hearing Officer reported that registrant admitted receiving [20] a copy of the Resume of the Inquiry,”——

and I might explain that that was the report of the Federal Bureau investigation, and a resume of that report is now given to all registrants (reading):

“The Hearing Officer also reported that registrant stated that his religious background is that of a Presbyterian, to which both of his parents belong, and that early in life he attended Sunday School of that denomination; that he became interested in the work of the Jehovah’s Witnesses in 1951, and that his wife had been a Jehovah’s Witness since 1941. He reported that registrant further stated that from reading and studying the Bible, and as he understood it, he is opposed to all wars except God’s wars; that he would defend himself and his family if attacked; that he would not take a human life; that he believed in obeying all laws of the Government and wanted to be a law-abiding citizen, but

that he is opposed to both combatant and non-combatant military service.

“The Hearing Officer concluded, from the facts adduced at the hearing, consideration of the registrant’s entire file, his attitude, candor, and apparent honesty, and his general [21] demeanor, that the registrant is opposed to war in any form based upon his religious training and belief; that he is opposed to both combatant and non-combatant training and service; and, that he is sincere and has filed his claim in good faith. Accordingly, the Hearing Officer recommended that the registrant’s claim be sustained.”

And I might say the Department of Justice finds that the registrant’s claim is sustained and the Department recommended that this registrant be placed in Class 1-O, which is the conscientious objector classification.

Your Honor, attached to that letter is the Resume of the Inquiry, which follows right after the last page of the letter.

The Court: Page 58.

Mr. Constine: That is right, your Honor. And I wish to read from the last paragraph on page 1 on that 58 (reading):

“The registrant has been employed by the Western Pacific Railroad, Cardinal Chemical Company, the City of Paris Department Store, ABC Weatherstripping Company, Kirby and Company of Central California, and the Davies Chevrolet Company. The registrant’s work record is highly satisfactory.”

I wish also to read, your Honor, from page 4 of that same resume, which would be, at the upper right-hand corner, 61.

The Court: I have it. [22]

Mr. Constine: The first paragraph, your Honor, is as follows (reading):

“A member of the Jehovah’s Witnesses at Menlo Park, California, advised that the registrant is very active and serious in the Witness work, and is Assistant Congregational Servant at the Menlo Park Kingdom Hall. The interviewee said that the registrant has an excellent record as a Pioneer and never misses a Witness meeting, and is also active as an Area Study Conductor. He stated that the registrant accepts any church assignment willingly, and, in his opinion, must have had a very strong attitude and conviction of conscientious objection to have originally made such a claim and served in a penitentiary.”

I call your Honor’s attention particularly to the next sentence (reading):

“The Congregational Servant of the Jehovah’s Witnesses at Menlo Park advised that he has known the registrant for six or seven months. His records show that the registrant served as a Pioneer from December, 1952, through August, 1954. The Servant stated that the registrant presently spends from thirty-eight to forty hours per month in Jehovah’s Witnesses’ work.” [23]

The next paragraph reads (reading):

“The School Servant and Record Clerk of the Watchtower Bible and Tract Society, Brooklyn, New York, advised that the registrant was ordained as a minister in the Jehovah’s Witnesses on April 17, 1952, and served as a Pioneer from December 1, 1952, until August 1, 1953, and from April 1, 1954, to August 1, 1954.”

It goes on to say (reading) :

“The Servant made the registrant’s record available, which reflects that the registrant devoted considerably more than 100 hours per month to his activities.”

I will next call your Honor’s attention to Document No. 19.

The Court: Dated March 9, 1956.

Mr. Constine: I have April 4, 1956, Document No. 19, unless I am in error.

The Court: Document No. 19 is April 4, 1956.

Mr. Constine: Yes, sir. That is a letter to the Selective Service System from the defendant, in which he says (reading) :

“This is in reply to your letter of March 9, 1956 (which included a recommendation from the Department of Justice and the FBI Resume Report).”

He goes on to state he appreciates the time and effort expended (reading) : [24]

“However, as my entire file reflects, the classification to which I am entitled is 4-D, a minister’s classification.”

Then he goes on and states his reasons for desiring the 4-D classification.

“I am both a conscientious objector and a minister, and I do not see why this has been consistently overlooked in this whole investigation.

“I find, therefore, that I cannot conscientiously accept a 1-O classification, and I hereby appeal this classification if the 1-O classification is continued and if I am ordered to report for a government job I shall have to refuse.”

Your Honor, we note that the defendant, in this letter, does not dispute the statement in the FBI report that at the time of the hearing he was spending but 30 to 40 hours a month as a Jehovah's Witness.

Mr. Constine: I will call your attention, if your Honor please, to Document No. 20, in which it is indicated that the Appeal Board, on July 20, 1956, placed this defendant in Classification 1-O, which is the conscientious objector classification. He was notified of that fact on July 26th. However, he received the classification on July 20, 1956—the 1-O classification.

Document 21, your Honor, is a letter dated August 1, 1956, [25] from the registrant, the defendant, to his local board, in which he states in part (reading):

“I find, therefore, that I cannot conscientiously accept a 1-O classification, and I hereby appeal this classification. If this classification (1-O) is con-

tinued and I am ordered to report for a government job I shall have to refuse.”

And then he states at the bottom of this letter (reading):

“I would appreciate hearing from you as to how long it will be before I am to be arrested, as I would like to notify my employer, my attorney, and straighten out my other personal affairs.”

Document 22, your Honor, is another letter from the defendant to his local board, dated August 5, 1956, and received by his local board—I made a mistake; excuse me.

The Court: August 31, 1956, Local Board No. 40.

Mr. Constine: My file is in error here, your Honor. Document 22, as I believe it is marked in your Honor’s file, should be a letter dated August 29, 1956.

The Court: 22?

Mr. Constine: Yes—which it is, Document No. 22.

The Court: Document 22, August 1, 1956?

Mr. Constine: I believe it is August 29, your Honor, 1956, received August 31st—Document 22.

The Court: Document 22 is August 29th. [26]

Mr. Constine: Yes, sir.

This letter is addressed from the defendant to his local board, in which he states that he did not check any of the preferences—that is, preferences for jobs (reading):

“* * * on the opposite page, because I do not wish to engage in any conscientious objector program.

In many of my previous letters I have stated if I were offered such jobs I could not conscientiously accept them.

“As I have already stated before your board, and as my file shows, I am an ordained minister of a recognized religious organization. Therefore, my proper classification is not 1-O, but is 4-D. I will not compromise my personal principles to the extent which your board proposes. I cannot understand, gentlemen, why it is so difficult for you to understand that I am not only a conscientious objector, but also a minister of religion.”

Document 23 is the next letter I wish to call to your Honor's attention.

The Court: That is dated September 26, 1956.

Mr. Constine: Yes, your Honor. It is addressed to the local board from Selective Service headquarters at Sacramento, and it is the two letters directly following this in the file that I wish your Honor to examine. They are not numbered, but [27] it is directly after this in the file.

The first is a letter to the Jehovah's Witnesses in Brooklyn, New York, from the Selective Service, asking information concerning this defendant's Pioneer work, and the next letter is a copy of a letter received by the California headquarters, which is dated September 19, 1956, and reads in part as follows (reading):

“Mr. Korte was in the pioneer service in 1952, 1953, and 1954. However, because of obligations requiring greater financial remuneration, it was neces-

sary for him to leave the pioneer service. He is now serving as Assistant Congregation Servant of the Menlo Park, California, Congregation of Jehovah's Witnesses and our Certificate for Servant in Congregation of February 15, 1955, covering this man's ministerial activity still applies."

And they refer to the previous certificate on file.

In Document 24, your Honor, is a resume of a hearing before the local board on October 18, 1956. The purpose of this hearing was to determine what type of civilian work the defendant would accept in lieu of induction, and I wish to read to your Honor, if you will permit me, a short resume of some of the questions and answers that were given (reading):

"Question: Mr. Korte, you understand that I am representing the State Director and that this [28] meeting was called to try to reach an agreement between you and the Local Board as to the type of civilian work you are to perform in your present 1-O classification?"

And he answers, "Yes."

Then he answers that he received the regular form for Class 1-O registrants, and he says yes (reading):

"Question: The Local Board submitted a letter to you offering you three different types of work, and this is your reason for nonacceptance written on the back of the Board's letter?

"Answer: Yes."

And that reason, if your Honor please, was one of the documents I last read to you (reading) :

“Question: Is there any reason, such as physical, that you cannot accept approved civilian work?

“Answer: No.

“What is your reason for not accepting? Is it due to your religious code?

“Answer: No; my personal feeling, or, you might say, mental; also Code of the Bible.

“Question: We have numerous positions available (registrant shown list of available positions). Would you care to peruse the list of available work?

“Answer: I would not be interested. My [29] duties revolve around the Bible.

“Question: Are we to understand by your answers that you are in no position to accept employment?

“Answer: Yes.

“Question: What kind of work are you doing at the present time?

“Answer: I am at the present time doing maintenance work at a swimming pool.”

The second page, your Honor (reading) :

“Question: Could you not continue to do this type of work if ordered to do so?

“Answer: Yes, but I could not compromise my position at this time to do so.

“Question: You have been offered all your rights, personal appearance, appeal, appearance before a Hearing Officer; at this meeting your classi-

fication does not enter into it. We are only here to reach an agreement as to the type of work you will accept. From your remarks, are you declining to accept any of the positions offered to you?

“Answer: Yes.”

Then it is indicated that he signed a statement to that effect.

May it please your Honor, Document No. 25 in your Honor's file, is the order to report for civilian work. It is dated [30] November 14, 1956, and it ordered the defendant to report to his local board at 9:00 a.m. on the 26th day of November, 1956, and advises him that he has been assigned to work at the Los Angeles Department of Charities, located at Los Angeles, California. This is an order to report for civilian work in lieu of induction.

Document No. 26 is the last document I wish to call to your Honor's attention. It is a memorandum dated November 26, 1956.

The Court: It is dated what?

Mr. Constine: November 26, 1956. This memorandum, your Honor, indicates that the defendant did not appear at his local board on the date specified to receive instructions to report for civilian work in lieu of induction.

The Court: In other words, he didn't appear in Los Angeles?

Mr. Constine: He didn't appear. He is ordered, your Honor, to appear at his local board. He didn't appear there or at Los Angeles.

In closing, your Honor, we will merely state that

the record clearly indicates he was classified as a conscientious objector. The Appeal Board so held. He was classified 1-O as a conscientious objector, but he has refused to accept civilian work in lieu of induction.

I will merely point out that the civilian work program [31] has been upheld by your Honor in *United States versus Niles* that proceeded to the Supreme Court, and certiorari was denied. That is a landmark case in which your Honor upheld the constitutionality of the Act. And we submit on that case that the defendant is guilty of the offense charged.

Mr. Wertheimer: May it please your Honor, at this time now comes the Defendant Robert Korte and moves for a judgment of acquittal. The undisputed evidence, your Honor, we feel indicates that the defendant is not guilty as charged.

The record you have before you reveals that on July 20, 1956, Mr. Korte was classified 1-O, conscientious objector, by the appeal board. At this time he was denied the 4-F classification required by Selective Service Regulation 1622.2, and more specifically by 1622.44. And I should like to read Paragraph C of that regulation, your Honor (reading):

“Class 4-F. Physically, mentally or morally unfit.

“1622.44 of the Selective Service Regulations.

“In Class 4-F shall be placed any registrant.

“(C) Who has been convicted of a criminal offense which may be punished by death or by imprisonment for a term exceeding one year and who

is not eligible for classification into a class available for service.”

The classification by the Appeal Board on July 20, 1956, [32] we believe to be without basis in fact, to be arbitrary and capricious, and contrary to law. But actually, the undisputed evidence has shown, as reported by opposing counsel, that Mr. Korte did serve a sentence for a felony, was convicted for a period of longer than one year, and therefore would fulfill the requisites of the Selective Service regulation to be classified as 4-F.

The Act itself, the 1948 Selective Service Act, Paragraph M, reads (reading):

“No person shall be relieved from training under this title by reason of conviction of a criminal offense except where the offense of which he has been convicted may be punished by death or by imprisonment for a term exceeding one year.”

Therefore, the final assignment and order in the case of the Defendant Mr. Korte to do civilian work is void.

The second point, your Honor, in our motion for judgment of acquittal, is that the action of the Appeal Board on July 20, 1956, was arbitrary and capricious and contrary to law in that they did not follow the actual Selective Service regulations as defined in Section 1623.2. I read from the regulations (reading):

“1623.2. Consideration of Classes.

“Every registrant shall be placed in Class 1-A under the provisions of Section 1622.10 of this [33] chapter except for classifications which are estab-

lished to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible, with Class 1-A-O considered the highest class, and Class 1-C considered the lowest class, according to the following table:" and there follows the table beginning at Class 1-A-O and going down to 1-C.

In this, the Appeal Board failed to follow this particular regulation by coming up from the bottom, for had they come up from the bottom they would have gone 1-C, 1-WV-A, 4-F, and Mr. Korte would have been classified 4-F. But, instead, to the contrary, they started at the top, 1-AO, and then classified him in the next category, 1-O, conscientious objector. This, we feel, ignored the 4-F classification entirely, and is contrary to 1623.2 of the regulations. Thus, the resulting classification was arbitrary and capricious, and without basis for and contrary to law. Therefore, we feel that it is void.

A third basis for a judgment of acquittal, your Honor, is the fact that, while Mr. Constine failed to indicate it, in one of the documents in the file a waiver was given by the armed forces to Mr. Korte, and it is attached to a document dated September 9, 1955. We believe that——

The Court: Pardon me. Is that document in evidence? [34]

Mr. Wertheimer: It is in evidence, but it was not pointed out by Mr. Constine. There is a waiver on the DD 47 form, I believe, and the waiver states

that Mr. Korte is eligible for the Army, the Navy, or the Marine Corps.

In our motion for acquittal at this time we say that it is not sufficient to make the defendant liable for civilian work, and that the waiver which is found in the documents in the file is not provided for either in the Act or the Regulation; that the civilian direction can be avoided, and that the armed forces may waive a disqualification for a place in civilian employment is without basis of fact and is arbitrary and capricious. It is our feeling that this waiver is good only, as indicated by the document itself, for military service, and therefore the final order which commands the defendant to report to the Los Angeles Charities is void.

On the basis of our motion for acquittal, your Honor, the fourth point we wish to raise is that the Selective Service File failed to contain any waiver of the conviction of the felony from the Los Angeles Charities Department. There is nothing in the file to show that the defendant is acceptable to the Charities, and, notwithstanding his conviction, there is no legal basis for him to be ordered to report to Los Angeles after being convicted of a felony.

Thus, in brief summary, our motion for acquittal is based, first, on the fact that he served time—eight months, to be [35] exact—for a felony; that on the basis of the regulations and the Act this would provide him, according to the regulation I read, for 4-F classification;

Secondly, had the classification schedule been followed, they would have begun at the bottom and go

up to the 4-F, not beginning at 1-AO and going down to the 1-O rating;

Thirdly, considering the waiver, had this been an effective waiver, as it is for the armed forces, certainly he should have gone back into the armed forces; but on July 20, your Honor, he was not a member of the armed forces. Therefore the waiver is ineffective and there is no basis for it;

And lastly, our point is that there is no waiver by the Los Angeles Department of Charities itself, saying that Mr. Korte, the defendant, might proceed there, and therefore the order is void.

It is on these four bases we move for a judgment of acquittal at this time.

(Whereupon followed argument of counsel not ordered transcribed in this record.)

The Court: May I inquire, for the purpose of the record, are you going to put on any other defense?

Mr. Wertheimer: After you rule on the motion we would like to put on a little bit of evidence, your Honor, if it is necessary.

The Court: For the purpose of the record, at this time I [36] will deny your motion, so you will have a full record.

Mr. Wertheimer: Will you take the stand?

ROBERT LEE KORTE, JR.

the defendant, was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

By the Court:

Q. Your full name, please.

A. Robert Lee Korte, Jr.

Q. Where do you live?

A. In Menlo Park, California.

Q. What is the address?

A. 727 Cedar Street.

Q. What is your business or occupation?

A. Well, my vocation is that of a minister, sir.

Q. Well, you have been employed during this period, have you?

A. I now have a secular job with a swimming pool company, part-time work.

Q. Where? A. In Redwood City.

Q. Redwood City? A. Yes.

Q. And how old are you? A. Twenty-four.

Q. Twenty-four years of age. You have already been committed? A. Yes, your Honor. [37]

Q. And when were you committed?

A. That was back in about 1953, I believe.

Q. '53? A. Yes.

Q. Who committed you? This Department here—this Court here?

A. It was the Federal Court, yes, in San Francisco.

Q. What time did you serve?

A. I served eight months of eighteen months.

(Testimony of Robert Lee Korte, Jr.)

Q. And did you have any difficulty adjusting yourself there? A. Well, a little bit at first.

The Court: Take the witness.

Direct Examination

By Mr. Wertheimer:

Q. Since we are on the subject, regarding your term at McNeil Island—well, I will read from the file—you might indicate to the judge what sort of work you did while you were in prison.

A. Well, we started out on the farm crew. We worked picking peaches, pears, and et cetera, from trees, and then when you have worked there for awhile, of course, you are eligible for better jobs, and eventually I was on the dairy crew, which was really quite interesting, how to milk cows, and so forth. And that was the employment that we had there.

The officials at McNeil were very co-operative in the sense that there were a number of my brothers there—Christian [38] brothers—so they permitted us to have our regular meetings during the week in our own barracks. And so that is why most of our recreational time was spent in studying to further our vocational——

The Court: You say you are employed at the present time in Redwood City?

A. Yes, sir.

Q. What is your salary there?

A. I make about—well, I work about ten days a

(Testimony of Robert Lee Korte, Jr.)

month and make about, roughly, \$16.00 a day, so it would be about \$160 a month.

Q. Who is at home with you?

A. My wife.

Q. How long have you been married?

A. About three years.

Q. Any family? A. No, your Honor.

Q. And how long have you been working at Redwood City?

A. Well, since I moved down there; it has been about four years, I guess.

The Court: Proceed, counsel.

Q. (By Mr. Wertheimer): Where did you attend high school?

A. San Francisco, Polytechnic High School.

Q. Did you have any honors while you were in high school?

A. You mean jobs in the school? [39]

Q. I just wanted to indicate your high school record, being one where Robert Korte was student body president at Poly High School.

Mr. Constine: May it please your Honor, for the record, I must interpose an objection, as this would be irrelevant, immaterial and incompetent, so far as the trial is concerned. However, I do not want to prevent the defendant from saying whatever he wishes to say in court. For the purpose of the record may I interpose an objection to any testimony not contained in the file?

The Court: It will be overruled.

(Testimony of Robert Lee Korte, Jr.)

Mr. Constine: Thank you.

Q. (By Mr. Wertheimer): While you were in Poly High School you were president of the student body. What sports activities were you involved in at that time?

A. I played on the basketball team and tried out for the baseball team and didn't make it.

Q. You were a basketball player at Poly. Did you attend college, Mr. Korte? A. Yes, I did.

Q. And where did you go to college?

A. University of California.

Q. And how long were you there?

A. About a year and a half.

Q. In the years 1952, 1953 and 1954, were you actually [40] spending full time as a minister?

A. Yes; one of the requirements of the Watchtower Society is that——

Q. Speak up.

A. One of the requirements of the Watchtower Society is before you can enter the full-time ministry you have to show by your past actions that you are capable of holding that job. And so no one is allowed to enter the full-time ministry until they have been associated for about six months. At the end of that time, why, I did enter the full-time ministry, and I stayed in it until near the end of 1954.

Q. You were classified as a Pioneer at that time?

A. That is correct.

Q. Would you tell his Honor what a Pioneer is?

A. Well, a Pioneer is a title used by the Society to designate one whose vocation is the ministry, and

(Testimony of Robert Lee Korte, Jr.)

who spends in the actual ministry activity preaching, delivering funerals and weddings, visiting the sick, and so forth, a minimum of 100 hours a month. This, of course, then requires outside study which cannot be counted as preaching time. You usually spend another, anywhere from 45 to 50 hours a month in preparing discourses, time going to and from conventions, and things like that.

Q. At the time of the 1-O classification in July, 1956, you were not a Pioneer, is that correct? [41]

A. That is correct.

Q. But were you to be classified now, and was this to be a void classification, regarding your work at present, are you a Pioneer at present?

A. Yes, I am.

Q. And how many hours per month are you putting in in your vocation? A. One hundred.

Q. And does that include hours of study?

A. No, it does not.

Q. Would you tell his Honor approximately how many hours of study and actual work as a minister you put in per month at the present time?

A. I am what they call the assistant presiding minister of our Menlo Park congregation, which means if anything drastic happens to the presiding minister, why, I would take over his obligations. There are many records that have to be kept and oversight of particular duties that have to be done, and plus my outside study I would say between 15 and 25 hours a week are spent in outside study and taking care of congregation business.

(Testimony of Robert Lee Korte, Jr.)

Q. At present you are able to perform marriages and officiate at funerals, is that correct?

A. Correct.

Q. You are the assistant presiding minister and you are a [42] Pioneer at the present time?

A. That is correct.

Mr. Korte, did you keep the Board informed during all of your relations and all of your movements and activities? A. Yes, I did.

Q. And, Mr. Korte, have you ever received a waiver from the Los Angeles Department of Charities?

Mr. Constine: I will object to that as incompetent, immaterial and irrelevant, your Honor, whether he received a waiver from the Department of Charities. There must be a foundation laid that they are required to submit such a waiver.

Mr. Wertheimer: I will be glad to attempt to lay a foundation, your Honor.

The Court: Sustained.

Mr. Wertheimer: Excuse me, your Honor.

The Court: Sustained, counsel.

Q. (By Mr. Wertheimer): Were you ever examined by the Los Angeles Department of Charities?

Mr. Constine: Objected to as immaterial, irrelevant and incompetent. He is assigned to work by the Selective Service.

The Court: Objection sustained.

Mr. Wertheimer: I would like to read a few statements from the file, your Honor.

(Testimony of Robert Lee Korte, Jr.)

Mr. Constine: Are you going to ask him questions?

Mr. Wertheimer: I am. [43]

Q. Are you familiar with the document of waiver dated 8 December, 1955, when you were cleared for the Army, the Navy and the Marine Corps, Mr. Korte?

A. Yes, I have seen it two or three times.

Q. And you did receive notice of this waiver?

A. I believe so.

Mr. Wertheimer: I would like to read, your Honor, briefly, into the record, from the FBI report, on page 4 (reading):

“In July, 1953, the registrant was found guilty of violation of the Selective Service Act and was sentenced to 18 months imprisonment. The registrant’s sentence was stayed until August 3, 1953, so that he could attend the International Conference of Jehovah’s Witnesses at New York City. The registrant was paroled from McNeil Island on March 24, 1954. The registrant was due to be released on April 15, 1954, but he earned 22 days for good behavior. His parole was terminated on February 2, 1955. The registrant’s prison and parole records are good and reflect that the registrant was in no difficulty, and that he appeared to be a law-abiding citizen, and that his future adjustment would be good.”

From that same document, I believe it indicates his early history, which was omitted when counsel read from the same document (reading): [44]

“The registrant attended Polytechnic High School

(Testimony of Robert Lee Korte, Jr.)

at San Francisco, California, from February, 1947, to February, 1951, at which time he was graduated. School records reflect that the registrant was an above-average student; that he was a member of the basketball team and president of the student body during his senior year."

Counsel from the government also read from an interrogatory dated October 18, 1956. It should be pointed out that the record also contains a note at the bottom, your Honor, saying that (reading):

"The foregoing was compiled from notes taken during the meeting and is not intended to be verbatim."——

only to give the sense. I indicate this at this time because when Mr. Constine read the question I think there was some lack of clarity in it. He read (reading):

"Could you not continue to do this type of work if ordered to do so?"——

referring to cleaning swimming pools, the work he is doing now.

Mr. Korte answered at that time (reading):

"Yes, but I could not compromise my position at this time to do so."

This being not verbatim did not actually reflect what Mr. Korte informs me was in his mind at the time, and while he is [45] on the stand I would like him to explain briefly to his Honor as far as the type of work that you would be involved in, were you given the opportunity to do so——

(Testimony of Robert Lee Korte, Jr.)

Q. Would you continue, et cetera?

A. The way the question was asked, he asked what I was doing at present to support myself, secularly. I mentioned I was doing maintenance work in relation to swimming pools. So then he mentioned as to whether or not I would like to continue doing maintenance work if I was ordered to do so by the local board, or by any appeal board of the government. And my thought on that was that the maintenance work he had in mind was what they had been talking about all along, was that of a helper of some type in the Department of Charities in Los Angeles, or some place else. And so I said—what I meant to say was no, I wouldn't do that; I wouldn't take care of something in a government institution some place. I would be willing to stay in the swimming pool business, as far as that goes, but——

The Court: Would you be willing, if you had an opportunity, to comply with the law in that respect?

A. Well, only in the sense that I couldn't go beyond my principles, because since I am a minister, at least in the eyes of myself, of God and our Society, why, if I am forced to give up that position through government order, to compromise no, I couldn't do that conscientiously. [46]

The Court: Well, I will say for your benefit, so that you may think about it, at least, without committing myself definitely, this record discloses that unless you are willing and able to avail yourself of that opportunity, my duty is clear. But I will give counsel an opportunity to disabuse my mind of that

(Testimony of Robert Lee Korte, Jr.)

at the proper time, so you build up your record so you will have a proper record.

The Court: Proceed.

Mr. Wertheimer: I have no further questions at this time, your Honor.

Mr. Constine: I just have a very few. I wanted to ask just a few questions.

Cross-Examination

By Mr. Constine:

Q. Mr. Korte, you stated that you served 18 months at McNeil Penitentiary?

A. No; I was sentenced to 18. I served about eight.

Q. About eight months? A. Yes.

Q. Mr. Korte, in April—between April and July, 1956, when you were classified 1-O, you were at that time performing about 40 hours a week secular employment, is that correct? A. That is correct.

Q. In other words, about eight hours a day, five days a week? A. Correct.

Q. And that was a job you were receiving a salary for at that [47] time? A. Correct.

Q. And you advised the draft board of that fact, is that true? A. Yes.

Q. And you were not a so-called Pioneer minister at that time, were you? A. No, I was not.

Q. In fact, you, through responsibilities, were not able to devote as much time to Jehovah's Witness activities as you had previously?

A. That's true.

(Testimony of Robert Lee Korte, Jr.)

Q. So then when you were classified 1-O in July, 1956, you did have at least secular employment that averaged about 40 hours a week? A. Yes.

Q. Now, may I ask you this question: Would you not be able at the present time to perform work in some charitable hospital or institution not run by the government, but say by a county or city, or by some charitable organization?

A. Well, the way I understand this is that this would be in lieu of induction for the purpose of performing a job that would be of benefit in some way to the County, the State, or the Federal Government, and I feel that my position of acting as a minister in my own particular community and locality is [48] of far greater importance, ministering to the spiritual welfare of the people in that community, than to work some place in a hospital as a helper, or whatever it might be.

Q. But if the Selective Service System, as it has here, has failed to recognize your ministerial classification, and you say, yourself, at the time you were classified you had a full-time job, could you not benefit mankind by ministering to the sick or the mentally ill? Could you not find that within your principles to perform? For example, work in a mental institution, or helping people who are ill, rather than serving the military? Would that compromise your principles too much to do so?

A. Yes, I believe it would.

Q. And you say at the present time you are a Pioneer, as of this date? A. That is correct.

(Testimony of Robert Lee Korte, Jr.)

Q. You haven't advised your draft board of that?

A. I don't believe so. It has only been about two months, now.

Q. Two months? A. Yes.

Q. Since you were indicted?

A. I think so.

Q. You were indicted in March, '57?

A. Yes. I began April 1st.

Q. Subsequent to your indictment? [49]

A. Correct.

Q. Up to that time you were performing approximately 40 hours a week, would you say, secular employment? A. Yes.

Q. However, subsequent to your indictment you gave up a portion of your secular employment?

A. Well, my attitude all along—I think it was stated many times in the file—that as soon as we were able financially for either my wife or myself to re-enter the full-time ministry, that's what we would do. We neglected entering before because of this reason—although I will admit it looks very coincidental that I began my Pioneer work after my indictment, and that is not meant to be that way. I would rather that not even be taken into consideration, that I am a full-time minister now, in this sense, because the way I have felt about it is that if I just kept putting off and putting it off because of what we are going through with the government here, why, I might never get back into it. So even though it is only for a month or two, I might just as well take advantage of it.

(Testimony of Robert Lee Korte, Jr.)

Q. So it is fair to say that at the time you were classified by the board, at the time you answered the questionnaire, and at the time of the FBI investigation, you were not a full-time minister at that time?

A. No, I wasn't. [50]

Q. And your vocation was that of certain secular work; you were doing your religious work at whatever time was left in the evening, is that the situation?

A. Well, the way I view what a vocation is, to me a person's vocation is a person's life work. My life work is the ministry, whether it is 40 hours a week or four million; that still is my vocation. And secular activities I would view as my vocation, although you might disagree. In the early days of this country when the pioneers were moving westward, the ministers that went with them worked generally six days a week to support themselves, because their flocks couldn't support them, and on the seventh day they were ministers.

The Court: What year was that?

A. It was quite some time back. I guess it was in the 1800's.

Q. Things have changed.

A. Yes, that's true.

Q. (By Mr. Constine): Some of these same ministers were not opposed necessarily to war in any form in the example that you give where ministers worked——

Mr. Wertheimer: I object to the question, your Honor, as argumentative.

(Testimony of Robert Lee Korte, Jr.)

Mr. Constine: I will withdraw it, your Honor. I have no further questions.

The Court: You may proceed. [51]

Redirect Examination

By Mr. Wertheimer:

Q. You were in the full-time ministry in what years, Mr. Korte?

A. In 1952, 1953, 1954 and presently.

Q. You are presently in the full-time ministry?

A. Yes. I might explain, at the moment, if I might, the reason this wasn't continued through was, and it is not the policy of our organization to give financial remuneration to its ministers. We serve voluntarily. So it is always necessary to have some type of employment to support ourselves and to support our ministry. Otherwise we would spend all our time in the ministry. But we have families, and scripturally our obligations are to our families to keep them clothed and fed, and so forth.

Q. But at the present time your major occupation is that of a Pioneer? A. Yes.

Q. And how many hours did you indicate, including study and service, are you putting in at present?

A. Oh, at least 150 a month.

Mr. Wertheimer: I have no further questions at this time.

Mr. Constine: I have no further questions.

The Court: What does your family consist of?

A. My wife and myself.

Q. Are your father and mother living? [52]

(Testimony of Robert Lee Korte, Jr.)

A. Yes, they are.

Q. Where are they located?

A. They live in San Francisco.

Q. What is the business or occupation of your father?

A. I don't know, your Honor; I haven't seen him for about three years.

Q. Why?

A. I haven't seen him for about three years.

Q. What was his business or occupation?

A. Well, the last job that I remember that he had held for quite some time, he worked with Shell Oil Company in San Francisco.

Q. In what capacity?

A. Accountant, I think he was.

Q. Did you have any discussion of religion with him? A. I attempted to, yes.

Q. With what result?

A. Negative. He was very narrow minded along certain lines.

Q. Why?

A. I say he was very narrow-minded along certain lines.

Q. I am not prepared to say that you are not a pretty good match for him in that respect. You sit there and indicate how the things should be arranged and under what conditions, and you are sitting in judgment as against all these investigations, and the law, itself. [53] A. My only——

Q. Your state of mind is contrary to every phase of the law, itself.

(Testimony of Robert Lee Korte, Jr.)

A. My only answer to that, your Honor, would be to call to your Honor's attention a like situation that arose quite some time back when St. Peter was engaged in his ministry activity, and he and his followers were brought before the Jewish Supreme Court and were told that they were to stop teaching on the basis of this name because they were going around disrupting everything, and they disagreed with everything.

Q. But the law was passed to take care of those who didn't want to participate physically in war, and they spelled out a program for everybody, keeping in mind all conditions as available. You wouldn't have to do anything; only be of assistance to those that need some help—hospitals, and such work—and you serve your time, and you owe that to your country the same as everyone else does, no matter what the religion. Boys that went on and paid the supreme sacrifice are to be thought of.

However, the reason I am talking to you, you have had an education. You have a mental capacity to realize fully the situation you are confronted with, and I would very much like to help you if you would give me an opportunity. If you don't, I can state to you my duty seems to be clear. Not because I am anxious to commit anyone to prison—I would sooner do [54] otherwise—but if there is nothing left for me to do, I shall have to do my duty in that respect.

You had better think about it, and step down.

A. Thank you, your Honor.

(Witness excused.)

Mr. Wertheimer: That closes the defendant's case, your Honor.

I would like to make a motion at this time.

The Court: You may.

Mr. Wertheimer: May it please the Court, the evidence as presented by the government and by the defendant indicates that the defendant is not guilty as charged; that the classification by the appeal board on July 20, 1956, was arbitrary and capricious, and contrary to law, in that it ignored the section of the Selective Service Regulation 1622.44 defining the 4-F classification, Subparagraph (c); that this determination in July of 1956 was improper and without basis in fact, because the evidence has shown that the defendant has been convicted of a felony and had served time in a federal penitentiary, and therefore the 1-O classification was arbitrary and capricious, contrary to law, and contrary to the Selective Service Act of 1948, Section 456, Subsection (m), indicating that no person shall be relieved from training under the title by reason of a conviction of a criminal offense except where the offense is punishable by death or by imprisonment for more [55] than one year. Therefore, the final order to a civilian to do civilian work is void.

Secondly, our motion for acquittal is based on the fact that at the time of the 1-O classification in July of 1956, the classification procedure commanded by the regulations under 1623.2 indicates that the appeal board failed to come up from the bottom of the list, from 1-C to Classification 4-F, but on the

contrary, went down the list from 1-AO to 1-O, conscientious objector.

The Court: I don't follow that process of reasoning clearly. You might elaborate on that.

Mr. Wertheimer: All right, your Honor.

In Section 1623.2 of the Regulations——

Mr. Constine: May it please your Honor, we will concede this fact—this is what counsel is saying: A man is entitled to the highest classification. For example, if the draft board classifies a man 1-O, a conscientious objector, and at the time he is a full-time minister and entitled to the 4-D classification, he should receive the 4-D classification, or as counsel points out, he has been convicted of a felony, he is entitled to the 4-F classification. If he is entitled to a higher classification, he should receive the highest classification—that is, assuming he is entitled to that particular classification. If it is conceded for the purpose of the argument that the man is a full-time minister and a [56] conscientious objector, he should be classified as a full-time minister. I think that is what counsel stated.

Mr. Wertheimer: Not quite. I would like to read the regulations.

The Court: You may.

Mr. Wertheimer: So the record is clear, again. 1623.2 of the Regulations states (reading):

“Consideration of Classes.

“Every registrant shall be placed in Class 1-A under the provisions of 1522.1 of this Chapter except where grounds are established to place the registrant in one or more of the classes listed in the following

table, the registrant shall be classified in the lowest class for which he is determined to be eligible”——

the lowest class (reading):

——“with Class 1-AO considered the highest class. and Class 1-C considered the lowest according to the following table:”——

I think if your Honor would take a glimpse at the regulation——

The Court: Give it to the clerk.

Mr. Wertheimer: ——1623.2.

The Court: You may read it.

Mr. Wertheimer: When you have read 1623.2 you can see that [57] it is our contention that you go up from the bottom of the list, because the top is in 1-A——

The Court: I don’t see it in this pamphlet.

Mr. Wertheimer: 1623.2.

The Court: 1623.2. The lower paragraph?

Mr. Wertheimer: That is correct. There it gives the list of classifications, and it indicates that rather than starting at the top of the list——

The Court: That is Class 1-A——

Mr. Wertheimer: If he is not eligible for 1-A—in this case Robert Korte was designated 1-O, and therefore he is not to be classified as 1-A—if he is not 1-A, you are to begin at the bottom of the list, 1-C, and work your way up. And we believe that, on the contrary, the classification board started at 1-AO and then classified him 1-O, where in fact, having been convicted of a crime, they should have started at 1-C and worked their way up, as it is commanded in the regulation, to give him the first category for

which he is eligible, and stopped at 4-F. Therefore we say that the final classification is arbitrary and contrary to law, and the final order to report to the Los Angeles Department of Charities for civilian work is void.

In our motion for judgment of acquittal we state again that the armed forces waiver of September, 1955, is not sufficient to make him liable for performance of civilian work, as [58] there is no provision, either in the Act or the Regulations, for the armed forces to waive a disqualification for a place in civilian employment, as the armed forces waiver is good, as stated in the waiver itself, for military service, and therefore the final order commanding the registrant to report to the Los Angeles Department of Charities, is void.

In our case, the registrant was not classified for military service, but was ordered to do civilian work; therefore the waiver of physical examination is not the same as a waiver by the local board or the Los Angeles Department of Charities.

Lastly, there is no basis in fact for the classification; it is contrary to law, arbitrary and capricious, and void, because the Selective Service failed to get a waiver of conviction from the Los Angeles Department of Charities, themselves. There is nothing in the file to show that the defendant is acceptable to the Los Angeles Department of Charities notwithstanding his conviction, and that there is no legal basis for the order for him to report for civilian work.

It is on these contentions, in view of the fact that

Mr. Korte having served a sentence prior to this in a federal penitentiary, that we move at this time for a judgment of acquittal.

The Court: This situation requires further study. I am going to take an adjournment until eleven o'clock tomorrow [59] morning. I have a matter on at 10:00. Both sides may prepare any future argument they may wish to present, at which time I shall make a determination on this case.

(Further discussion by counsel not ordered transcribed for this record.)

(Whereupon an adjournment was taken until Tuesday, June 4, 1957, at 11:00 o'clock [59-A] a.m.)

Tuesday, June 4, 1957—11:00 A.M.

(Following argument by counsel for the respective parties not ordered transcribed for this record, the following proceedings were had:)

The Court: Is the matter submitted?

Mr. Wertheimer: Submitted, your Honor.

The Court: As the case now stands submitted—I reviewed the case in its entirety—the Court will enter a judgment of guilty as charged in the indictment.

Do you think your client would avail himself of the charity that the law provides?

Mr. Wertheimer: Are you speaking, your Honor, of——

The Court: Civilian activity.

Mr. Wertheimer: It is the defendant's contention that that is not acceptable to him, your Honor.

I should like to move at this time that until the time of sentence his bail be continued as it is. The government does not object.

Mr. Constine: Do I understand that counsel now moves to have the matter referred to the probation officer for his presentence report?

Mr. Wertheimer: I would appreciate that, your Honor.

Mr. Constine: We have no objection to that, your Honor.

The Court: There is not much of a report you can make. [60]

Mr. Constine: I think all the facts are before your Honor.

The Court: However, I don't want to deny him any opportunity that is available to anyone else.

Mr. Wertheimer: We move that the matter be referred, then, to the probation officer.

The Probation Officer: Two weeks, your Honor—June 18th?

Mr. Constine: Is that agreeable?

Mr. Wertheimer: June 18th?

Mr. Constine: Whatever date is agreeable to counsel, your Honor, and the Court.

Mr. Wertheimer: I would prefer a little bit before that, or a little after.

The Court: A little before what?

Mr. Wertheimer: Before the 18th—the day before, or, preferably, June 24th.

The Court: I will give you the 17th, if you want the day before.

Mr. Wertheimer: Thank you.

The Court: Is that agreeable, counsel?

Mr. Constine: Is that agreeable?

Mr. Wertheimer: That is.

Mr. Constine: There is a problem of bail, your Honor. He is presently, I believe, on \$500 bond.

Mr. Wertheimer: That is correct.

The Court: Do you recommend that the bail be \$500? [61]

Mr. Constine: He is on that now. I don't know if counsel desires that he remain on bail pending judgment.

Mr. Wertheimer: I move that he remain on bail pending judgment at this time.

The Court: The rule of this Court has been when a defendant is found guilty—and I don't make any exceptions of it—he is ordered into custody until the case is disposed of.

Mr. Wertheimer: Isn't it possible, pending the probation report and pending sentence, that the bail be continued? Do you have discretion in that matter?

The Court: I have discretion in the matter, there is no doubt about it, but I have always tried to treat all these defendants, insofar as I can, in the same way. I have ordered them all into custody after a full hearing.

Mr. Wertheimer: If you make judgment and sentence at this time, your Honor, would it be possible to request a stay of execution?

The Court: Oh, yes. You are entitled to that under the law.

Mr. Wertheimer: Could I confer with my client for just one moment?

The Court: Certainly.

Mr. Constine: Would your Honor desire to take a recess for a few moments?

The Court: No. I will give him plenty of [62] time.

I haven't talked to the wife. With your permission I will call her to the stand.

Mr. Wertheimer: Certainly, your Honor.

The Court: Step forward.

MRS. ROBERT LEE KORTE, JR.

was called as a witness on behalf of the defendant, and, after being first duly sworn, testified as follows:

The Court: Be seated. You needn't answer any questions you don't wish to answer. It is only that I wish to get your state of mind in relation to your husband.

The Court, after hearing all the testimony, concluded that your husband violated the law. There is nothing for me to do but to sentence him, unless he wants to avail himself of the opportunity to do any civilian work.

The Witness: I think my husband has made his statement.

The Court: What is it?

A. I believe that he has said what he desires. I agree with his wishes, since he is the head of the house, and I am in full accord with it.

(Testimony of Mrs. Robert Lee Korte, Jr.)

Q. We live in a country where if everyone takes this law and violated it in the manner it has been violated here, we wouldn't have any country at all; the Russians and the rest of them would come over here, and it would be an invitation for them to come, and we would be lucky to get enough to eat. [63] Coupled with that, young men of this young man's age, and over, have paid the extreme penalty by their lives to sustain what we have.

History records these changes from time to time, from century to century, and we have to conform to the law if we hope to maintain what we have got. It is as simple as that. There is no mystery about it at all—no mystery about it at all.

And tell me, have you met the defendant's father and mother?

A. I have met his mother; I don't know his father.

Q. And what does his father do? What is his occupation, do you know?

A. I really don't know. I have talked with him on the phone, but I have never met him, nor have I ever seen him. I know his mother. He has a very nice mother. She is a very nice person.

Q. I am happy to hear you say that.

(Addressing defendant): Tell me, what does your father do? What is his occupation?

The Defendant: I don't know, your Honor, for the reason that I haven't seen him for three years, as I mentioned.

The Court: When you did see him, what was he engaged in? What did he do?

(Testimony of Mrs. Robert Lee Korte, Jr.)

The Defendant: He was working for Shell Oil at the time. [64]

The Court: How long has he worked for Shell Oil?

The Defendant: Up to that time he worked for them for about 25 years.

The Court: Twenty-five years?

The Defendant: Yes.

The Court: And he maintained you in school, did he not?

The Defendant: That is correct.

The Court: And the education you got, your father made it possible for you to get that education, did he not?

The Defendant: Partly. I worked during summer vacations to accumulate and finance myself partly.

The Court: Partly?

The Defendant: Yes.

The Court: That wasn't a great deal, was it?

The Defendant: No.

The Court: Well, I was sorry to see you—I didn't know your father and I don't know him now, but I learned long ago as a youngster to honor my father and my mother, and a boy who doesn't do that—keep it in mind—will have time to remember it for a long, long time.

The penalty here is five years in the penitentiary, or \$10,000 fine, or both. That is what you are confronted with, young man. I want you to know it now. You can't go around and interpret the law to suit

and mother in every way that I could, except when they wanted me to do things that I thought were not right—not to appear to be smart in my own conceit——

The Court: Let's go to your mother. Have you respect for your mother?

The Defendant: Certainly.

The Court: And you haven't seen her for three years?

The Defendant: No; I just saw her day before yesterday.

The Court: Yes. And what did she say to you about the situation you find yourself in?

The Defendant: Well, she naturally doesn't agree with my particular viewpoint.

The Court: I am not surprised.

Who sentenced you?

Mr. Constine: It was former Judge Monroe Friedman, your Honor.

The Court: What was the sentence at that time?

Mr. Constine: It was 18 months.

Mr. Wertheimer: Of that 18 months the defendant served approximately eight months, and received some time off, as I [68] think you read in the record.

The Court: Do you want to say anything in relation to punishment?

The Defendant: No, your Honor.

The Court: I am speaking to your attorney.

The Defendant: Excuse me.

Mr. Wertheimer: I have indicated throughout the trial and the comments on the evidence, your

Honor, and I should like to bring your attention at this time as well, that, in view of the fact that the defendant has already served time; that his record has been an exemplary one; that throughout his sentence at McNeil Island he indicated co-operation, and his record showed that he did, I feel that any leniency that you might show at this time, of course, would be appreciated, and we request it of your Honor.

The Court: I will hear from the government.

Mr. Constine: Your Honor, we have no particular recommendation to make. I would say to your Honor that we would have no objection to probation if the defendant was willing to accept some civilian work in lieu of induction, and if he would obey the order, even at this time, we would agree that he should be permitted to do so, as any defendant who may submit to induction after conviction. We would have no objection to that. But he takes the position he will not, so I think there is no alternative for your Honor. [69]

Mr. Wertheimer: I think I might comment also, so that the record might be clear, that any consideration you would have regarding probation at this time would be appreciated, also, your Honor.

The Court: I will put the case over to the 17th, and I will get a report from the Probation Department and make a final determination at that time.

You will go into custody, young man.

(Whereupon, the matter was continued to Monday, June 17, 1957.) [70]

and for the record, and request at this time, pursuant to Rule 46 of the Criminal Procedure Rules, that bail be continued during the pending of the appeal.

Mr. Constine: It is our position, your Honor, that there is no real issue in this case. However, the question of bail on appeal is entirely within your Honor's discretion, and we will simply submit it. The rule has been somewhat liberalized recently. It used to be unless there was a substantial question a defendant was not allowed bail on appeal. The rule has now been liberalized to the point that it reads that unless the appeal is frivolous, bail should be allowed. But the Appellate Court still takes the position that there must be some question, or some serious issue.

The Court: What is the position of the government in relation to bail?

Mr. Constine: I might state this: In many cases that we oppose bail on appeal in the District Court, and the Appellate Court allows it anyway. [73]

The Court: What is that?

Mr. Constine: In many cases in which we oppose bail on appeal in the District Court, the Appellate Court allows bail anyway, your Honor. But to be honest with your Honor, I don't think there is any question for appeal here, although I may be disagreed with further on. In any event, we would oppose bail on appeal at this juncture.

Mr. Wertheimer: Your Honor, we raised some points which we feel three, at least, have validity, in view of the new position of the Court. This, by

no means, is a frivolous act being done for the purpose of just continuing the matter on appeal. We are serious, as far as taking this matter to the higher court. And in view of the fact that this is not a frivolous one, it is our request that bail be continued.

The Court: What is the bail now?

Mr. Constine: The defendant, your Honor, has been on \$500 bail.

Mr. Wertheimer: That is correct.

Mr. Constine: He has attended all the hearings. I don't think there is any question he will flee the jurisdiction.

The Court: The bail, then, will remain at \$500.

Mr. Constine: That is on appeal.

Mr. Wertheimer: Thank you, your Honor.

Mr. Constine: Will you post that bail today? There will have to be an appeal bond. [74]

Mr. Wertheimer: We will do so.

The Court: Very well.

Mr. Wertheimer: Thank you.

Certificate of Reporter

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 74 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting to the best of our ability.

/s/ W. A. FOSTER,

/s/ JOSEPH F. SWEENEY.

[Endorsed]: Filed September 3, 1957. [74-A]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE
RAISED ON APPEAL

1. The Appeal Board denied the IV-F classification required by Section 1622.2 of the Selective Service Regulations without basis in fact, as evidence showed defendant had been previously convicted of a felony. Therefore I-O classification is arbitrary, capricious, and contrary to law, resulting in the final assignment and order to do civilian work being void.

2. The Appeal Board arbitrarily and capriciously failed to follow the classification procedure commanded by Section 1623.2 in failing to come up from the bottom of the list of classifications from I-C to IV-F but, on the contrary, went down the list of classifications from I-A-O to the I-O classification and entirely ignored the IV-F classification completely, all of which is contrary to Section 1623.2 of the Selective Service Regulations, resulting in the final classification being arbitrary, capricious and contrary to law, making the final order to report for civilian work void.

3. The Armed Forces waiver dated September 9, 1955, is not sufficient to make the defendant liable for the performance of civilian work because there is no provision in the Act or the Regulations for the Armed Forces to waive the disqualification for a place of civilian employment, but the Armed Forces waiver is good only for military service and, there-

fore, the final order commanding the defendant to perform civilian work is void.

4. The final order commanding the defendant to report for civilian work with the Los Angeles Department of Charities is void because the Selective Service System failed to get a waiver of the conviction from the Los Angeles Department of Charities, the place of employment, and since there is nothing in the file to show that the defendant was acceptable notwithstanding his conviction there was no legal basis for the order to report for civilian work.

A copy of this statement has been sent to United States Attorney Lloyd Burke.

Dated: August 16, 1957.

SMALL AND WERTHIMER,

By /s/ RICHARD J. WERTHIMER,
Attorneys for Defendant.

[Endorsed]: Filed August 20, 1957.

United States Court of Appeals
for the Ninth Circuit

Case No. 15673

ROBERT LEE KORTE,

Appellant-Defendant,

vs.

UNITED STATES OF AMERICA,

Respondent-Plaintiff.

STIPULATION

It Is Hereby Stipulated that the Selective Service file in the above-entitled matter be considered in its original form without necessity of reproduction in the printed record.

SMALL AND WERTHIMER,

By /s/ RICHARD J. WERTHIMER,
Attorneys for Appellant.

By /s/ DONALD B. CONSTINE,
Assistant U. S. Attorney,
Attorney for Respondent.

[Endorsed]: Filed September 26, 1957.